IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KIMBERLY BURRELL, Plaintiff, v. ASTRAZENECA LP and ASTRAZENECA PHARMACEUTICALS LP, et al. Defendants.	)	C.A. No. 07C-01-412 (SER)
PATRICIA FLOWERS, Plaintiff, v. ASTRAZENECA LP and ASTRAZENECA PHARMACEUTICALS LP, et al. Defendants.	)	C.A. No. 07C-04-110 (SER)
MIMI RO, Plaintiff, v. ASTRAZENECA LP and ASTRAZENECA PHARMACEUTICALS LP, et al. Defendants.	)	C.A. No. 07C-04-267 (SER)

PUBLIC VERSION

Date Submitted: June 18, 2010
Date Decided: September 20, 2010

MEMORANDUM OPINION.
Upon Consideration of Defendants' Motion for Summary Judgment Based on Statute of Limitations.
GRANTED.

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SLIGHTS, J.

I.

In this opinion, the Court considers whether the separate claims of three plaintiffs in the Seroquel® litigation[1] must be dismissed with prejudice because they were filed beyond the applicable statute of limitations. AZ has moved for summary judgment on the ground that the claims are time-barred by the Delaware statute of limitations for claims of personal injury. Plaintiffs, Kimberly Burrell ("Ms. Burrell"), Patricia Flowers ("Ms. Flowers"), and Mimi Ro ("Ms. Ro") (collectively "Plaintiffs") have filed a joint opposition to the motion in which they argue that: (1) the Court must engage in a choice of law analysis to determine whether the statutes of limitations of their respective home states should apply under Delaware's so-called "borrowing statute;" (2) the "time of discovery exception" should operate to extend the applicable statute of limitations; and (3) the statute of limitations should be tolled because AZ fraudulently concealed the facts which give rise to their claims.

After carefully considering the motion and the Plaintiffs' response, the Court is satisfied that the borrowing statute requires the Court in this instance to apply Delaware's two year statute of limitations to Plaintiffs' claims. The Court is further satisfied that neither the time of discovery exception nor the fraudulent concealment

[1]Several hundred plaintiffs have filed suit in Delaware against Defendants, AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively "AZ"), alleging that their ingestion of Seroquel®, an atypical antipsychotic medication, has caused them to develop Type II diabetes.

doctrine will toll the statute of limitations sufficiently to save the Plaintiffs' claims from summary judgment. Accordingly, AZ's Motion for Summary Judgment must be **GRANTED**.

II.

A. Kimberly Burrell

Ms. Burrell is a resident of Utah.[2] The parties do not dispute the following key dates relevant to AZ's statute of limitations challenge to her claims: she was prescribed Seroquel® on January 24, 2000;[3] she was diagnosed with diabetes on February 2, 2004;[4] and she filed this action for personal injuries allegedly caused by her ingestion of Seroquel® on January 31, 2007, approximately two years and seven months after her diagnosis of diabetes.[5] Ms. Burrell's prescription for Seroquel® , her use of Seroquel®, and her diagnosis and treatment of diabetes all took place in Utah.[6]

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[2] Pls.' Answering Br. Opp. AZ's Mot. Summ. J. (Transaction ID ("Tr. ID") 28032819) 19 [hereinafter "Pls.' Ans. Br."]; AZ's Mem. Supp. Mot. Summ. J. (Tr. ID 27338450) 3 [hereinafter "AZ's Mem."]; AZ's Appendix In Supp. Of Mot. for Summ. J. (Tr. ID 27338450) Ex. B [hereinafter "AZ App."].

[3] AZ App. Ex. B

[4] *Id.*

[5] Complaint, Tr. ID 13646424.

[6] AZ App. Ex. B

B. Patricia Flowers

Ms. Flowers is a resident of New York.[7] The parties do not dispute the following key dates relevant to AZ's statute of limitations challenge to her claims: she was prescribed Seroquel® in July, 1999;[8] she was diagnosed with diabetes on November 20, 2003;[9] and she filed this action for personal injuries allegedly caused by her ingestion of Seroquel® on April 5, 2007, approximately three years and four months after her diagnosis of diabetes.[10] Ms. Flowers' prescription for Seroquel®, her use of Seroquel®, and her diagnosis and treatment of diabetes all took place in New York.[11]

C. Mimi Ro

Ms. Ro is a resident of California.[12] The parties do not dispute the following key dates relevant to AZ's statute of limitations challenge to her claims: she was first prescribed Seroquel® in June, 2001;[13] she was diagnosed with diabetes on May 23,

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[7] *Id.* at Ex. G

[8] *Id.* at Ex G, Ex. D, at 13:11-19

[9] *Id.* at Ex. G, Ex. F, at 64:2-11

[10] Complaint, Tr. ID 14376935.

[11] AZ App. Ex. G

[12] *Id.* at Ex. I

[13] *Id.*

2002;[14] and she filed this action for personal injuries allegedly caused by her ingestion of Seroquel® on April 12, 2007, approximately four years and ten months after her diagnosis of diabetes.[15] Ms. Ro's prescription for Seroquel®, her use of Seroquel®, and her diagnosis and treatment of diabetes all took place in California.[16]

III.

In its Motion, AZ argues that Plaintiffs' claims are time-barred under Delaware's two year statute of limitations for claims alleging personal injury.[17] AZ argues that Delaware's borrowing statute, 10 *Del. C.* § 8121 (hereinafter the "borrowing statute"), does not save the Plaintiffs' claims because the Court may not consider another state's statute of limitations if the Plaintiffs' claims are barred by the Delaware statute of limitations.[18] Nor do any of the applicable tolling doctrines save the Plaintiffs, according to AZ, because Plaintiffs were aware of their injuries and aware of the facts needed to make their claims well beyond two years of the expiration of the statute of limitations.

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[14] *Id.*

[15] Complaint, Tr. ID 14456500.

[16] AZ App. Ex. I

[17] 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained....").

[18] AZ's Mem. 2.

Not surprisingly, Plaintiffs disagree. First, they argue that because AZ failed to conduct a thorough choice of law analysis to determine which state's statute of limitations should apply in each case, the Motion is deficient on its face and should be denied.[19] In the event the Court declines to engage in a choice of law analysis with respect to the statute of limitations, Plaintiffs argue that their claims are timely even under Delaware's two year statute because the "time of discovery" exception for inherently unknowable injuries tolls the statute to beyond the filing dates of their complaints.[20] Finally, Plaintiffs argue that because AZ fraudulently concealed the dangers of Seroquel® from them (and from other consumers), the statute of limitations is tolled until such time as they reasonably could have discovered the relevant facts giving rise to their claims.[21]

IV.

The Court's principle function when considering a motion for summary judgment is to determine whether genuine issues of material fact exist.[22] Summary judgment is appropriate if, after reviewing the record in a light most favorable to the

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[19] Pls.' Ans. Br. 19-20.

[20] *Id.* at 22.

[21] *Id.*

[22] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted).

non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[23] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[24] The moving party bears the burden of demonstrating that the undisputed facts support his claims or defenses.[25] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that material issues of fact remain for resolution by the ultimate fact-finder.[26] "By its very terms, the standard of Rule 56(c) provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."[27] In the case of a motion for summary judgment based on a statute of limitations defense, the Court must grant the motion if the record reveals that no genuine issues of fact exists regarding the date on which the applicable statute of

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[23] *Id.*

[24] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[25] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[26] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[27] *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 538 (D. Del. 1988) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

limitations began to run, the date to which the statute of limitations may have been tolled, and the date on which the plaintiff filed her complaint with the court.[28]

V.

The Plaintiffs urge the Court to deny AZ's Motion because AZ has not adequately established which state's statute of limitations applies to each of the Plaintiff's claims. This argument requires the Court to address the proper application of the Delaware borrowing statute. Plaintiffs also contend that the applicable statute of limitations is tolled because the so-called "time of discovery" exception to the statute of limitations tolls the statute until such time as the Plaintiffs discovered the connection between their diagnoses of diabetes and their ingestion of Seroquel®. In addition, Plaintiffs argue that the statute of limitations is tolled because AZ fraudulently concealed the link between diabetes and Seroquel®. These arguments require the Court to consider when the Plaintiffs' causes of action accrued for statute of limitations purposes, both under the laws of accrual and potentially applicable tolling doctrines.

A. The Delaware Borrowing Statute

The Delaware borrowing statute provides, in pertinent part:

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[28] *See e.g. McClements v. Kong*, 820 A.2d 377, 381 (Del. Super. Ct. 2002) (granting summary judgment on statute of limitations ground after identifying the applicable statute, fixing the date on which it began to run, and addressing any possibly applicable tolling doctrines).

> Where a cause of action arises outside of [Delaware], an action cannot be brought to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state...where the cause of action arose, for bringing an action upon such cause of action.[29]

Under the clear and unambiguous terms of the statute, the Court must apply "the shorter of the Delaware statute of limitations or the statute of limitations of the state where the cause of action arose...."[30] In other words, for claims alleging personal injury, "the maximum limitations period allowable to [the] plaintiff is [Delaware's] two year [statute of limitations]."[31]

Notwithstanding the clear language of the borrowing statute, Plaintiffs argue that the Court must engage in a formal choice of law analysis to determine if the statute of limitations of Delaware or their respective home states (or some other state) should apply to their claims. In support of this argument, Plaintiffs point to a lone decision of the United States District Court for the District of Delaware in which the court purportedly interprets the borrowing statute as requiring the trial court to employ a choice of law analysis in all instances to determine which state's statute of limitations, as among competing states with a possible connection to the litigation,

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[29] 10 *Del. C. §* 8121.

[30] *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 539 (D. Del. 1988).

[31] *See Weber v. McDonald's Sys. Of Europe, Inc.*, 660 F. Supp 10, 14 (D. Del. 1985).

should apply.[32]

In re W.R. Grace & Co. involved adversary claims in a bankruptcy proceeding in which the plaintiff, the State of California, alleged that properties it owned in California were damaged by the presence of asbestos manufactured by the debtor, W.R. Grace & Co. Applying Delaware's borrowing statute, the Bankruptcy Court dismissed the claims as time barred under either Delaware's or California's statute of limitations. The Bankruptcy Court did not, however, engage in a choice of law analysis before reaching its conclusion that the claims were time barred. The property owner appealed. The District Court, in appellate review of the Bankruptcy Court decision, reversed the entry of summary judgment upon concluding that the lower court improperly applied Delaware's borrowing statute. Specifically, the court held that because the California and Delaware statutes of limitations for property damage claims were the same (both three years), and because the purpose of the borrowing statute - - to prevent forum shopping - - would not be advanced in a case where the defendant in the adversary action, not the plaintiff, selected Delaware as the forum, the "[borrowing] statute provide[d] no guidance" in the resolution of the statute of limitations issue.[33] Finding no guidance in the borrowing statute, the court "turn[ed]

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[32] *See In re W.R. Grace & Co.*, 418 B.R. 511 (D. Del. 2009).

[33] *Id.* at 516-18.

to Delaware's traditional choice-of-law rules" to decide the question of which state's statute of limitations should apply.[34] The court then concluded that California's statute, "'with all its accoutrements,' including laws of accrual," applied to the plaintiff's claims.[35] And, applying California's more generous laws of accrual, the court determined that genuine issues of material fact "exist[ed] as to when [plaintiff's] claims accrued...."[36]

This Court's review of *In re W.R. Grace & Co.* prompts several reactions. First, the case is factually distinguishable. In *In re W.R. Grace & Co.,* the plaintiff did not choose Delaware as the forum to litigate its claims; the choice of forum was made by the debtor who sought bankruptcy protection in Delaware and was then able to defend adversary claims in its chosen forum. "Forum shopping," therefore, was not a concern there. In this case, of course, Plaintiffs chose Delaware as their forum to litigate these claims. Second, the court in *In re W.R. Grace & Co.* apparently was unable to find "guidance" in the clear terms of the borrowing statute under the facts presented there. Not so here - as stated above, the Court is guided by the borrowing statute's clear mandate that the "shorter" of the competing statutes of limitations will

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[34] *Id.* at 518.

[35] *Id.* at 517, 518.

[36] *Id.* at 525.

apply. Finally, if the court in *In re W.R. Grace & Co.* intended to hold that, in cases where the cause of action arose elsewhere, Delaware trial courts must engage in a choice of law analysis in all instances where the competing states' statutes of limitations (with or without "accoutrements") are the same, then this Court is satisfied that the decision is contrary to settled Delaware law and declines to follow it.

Delaware courts have uniformly held that when a complaint alleging a cause of action that arose outside of Delaware is time-barred under the Delaware statute of limitations, the Court need not conduct a choice of law analysis and may apply the Delaware statute of limitations.[37] This construction recognizes that, under the borrowing statute, Delaware courts are obliged to apply the Delaware limitations period if it is "shorter" than the statute of limitations that might apply from another jurisdiction.[38] Thus, if the claim fails under the Delaware statute of limitations (with "accoutrements"), it is time barred as a matter of law. This construction appears to

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[37] *See, e.g.*, *Elmer*, 698 F. Supp. at 539 ("Because Delaware's borrowing statute requires the Court to apply the shorter of the Delaware statute of limitations or the statute of limitations of the state where the cause of action arose, and plaintiff's claim is time barred under Delaware law, further analysis of where the action arose and what statute of limitations would apply there is unneccessary."); *Plumb v. Cottle*, 492 F. Supp. 1330, 1336 (D. Del. 1980) ("The borrowing statute in effect provides that an action may not be maintained in the Delaware courts if it is time barred *either* in Delaware *or* in the state in which the cause of action arose.")(emphasis added); *Amoroso v. Joy Manufacturing Co.*, 531 A.2d 619, 621 (Del. Super. 1987) ("Having determined that the time limited by Delaware law...is four years from the date of sale, the Court need not consider the time limited by the state where the cause of action arose....").

[38] *Id.*

be in accord with the construction of borrowing statutes in other jurisdictions.[39]

Under Delaware's borrowing statute, the Court must first determine whether Plaintiffs' claims are time barred under the Delaware statute of limitations, as AZ asserts. If so, then no further analysis is necessary and the motion for summary judgment must be granted. If, however, Plaintiffs' claims are not barred under the Delaware limitations period, then the Court must consider the statutes of limitations from the states with "the most significant relationship" to Plaintiffs' respective claims to determine if they are "shorter" than Delaware's statute.[40]

B. The Accrual Of Plaintiffs' Claims Under Delaware's Statute of Limitations

Parties rarely dispute which statute of limitations applies or what the statute says.[41] Instead, statute of limitations disputes almost always revolve around the date on which a plaintiff's cause of action accrued because it is this date that determines

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[39] *Accord* 67 A.L.R. 2d 216 § 2 (2009) ("[A]n action barred by the limitation of the forum will be barred, even if the borrowing statute is applicable and the limitation of the other state has not run.") (internal quotations and citations omitted).

[40] *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del. 1991) (adopting the Restatement (Second) of Conflicts of Law § 145 to resolve choice of law disputes in tort claims).

[41] In this case, the parties agree that, if Delaware law applies, then Delaware's two year statute of limitations for claims alleging personal injuries applies to Plaintiffs' claims. *See* 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained; subject, however, to the provisions of § 8127 of this title.").

when the statute of limitations begins to run.[42] This case is no exception.[43] AZ and Plaintiffs take differing views on the accrual date for Plaintiffs' claims. AZ asserts that the claims accrued at the very latest on the date the Plaintiffs were diagnosed with diabetes.[44] Plaintiffs, on the other hand, argue that either the "time of discovery" exception or the "fraudulent concealment" doctrine applies to toll the running of the statute of limitations until Plaintiffs "were on notice that a potential claim existed."[45] In either event, it is Plaintiffs' burden to "demonstrate that the statute of limitations period should be tolled."[46]

1. The Time of Discovery Exception

The "time of discovery" exception, also known as the "inherently unknowable injury" doctrine, provides that "when an inherently unknowable injury...has been suffered by one blamelessly ignorant of the act or omission and injury complained of,

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[42] *See U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 503 (Del. 1996) ("In addressing when an action is time-barred, a necessary first step in the analysis is determining the time when the action accrued.") (citing *Ewing v. Beck*, 520 A.2d 653, 662-64 (Del. 1987)). *See also* AZ's Mem.12; Pls.' Ans. Br. 28.

[43] *See* AZ's Mem. 12 ("[A]t the very latest, Plaintiffs' actions accrued for limitations purposes on the date of their *diabetes diagnosis*."); Pls.' Answering Br. 28 ("Plaintiffs were not on notice of a potential claim until Plaintiffs learned about a potential causal connection between Seroquel and diabetes from television commercials discussing Seroquel personal injury litigation.").

[44] AZ's Mem. 12.

[45] Pls.' Ans. Br. 22.

[46] *Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. 2006); *In re Tyson Foods, Inc. Consol. S'holder Litig.,* 919 A.2d 563, 586 (Del. Ch. 2007).

and the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' under §8118 when the harmful effect first manifests itself and becomes physically ascertainable."[47] "[T]olling ends where plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his injury."[48] Plaintiffs contend that the doctrine has been refined in cases where a "plaintiff remains blamelessly ignorant of the potential claim even after a latent injury reveals itself through physical ailments."[49] Under these circumstances, Plaintiffs contend, the statute of limitations begins "to run when [P]laintiffs were on notice of a potential tort claim."[50]

The Court first addresses the parties' differing views of the time of discovery exception. AZ is correct that legion Delaware authority stands for the proposition that "an injury is 'sustained' under [§8119] when the harmful effect first manifests

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[47] *Layton v. Allen*, 246 A.2d 794, 798 (Del. 1968).

[48] *Ryan v. Gifford*, 918 A.2d 341, 359 (Del. Ch. 2007). *See also Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982) (quoting *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, 230 N.W.2d 87, 89-90 (Neb. 1975) ("Even in malpractice and fraud cases where a discovery rule is applied it is not the actual discovery of the reason for the injury which is the criteria.... [D]iscovery means discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.")).

[49] Pls'. Ans. Br. 24 (citing *Brown v. E.I. duPont de Nemours & Co., Inc.*, 820 A.2d 362 (Del. 2003)).

[50] *Id.*

itself and becomes physically ascertainable."[51] In these cases, the focus is on the date on which the plaintiff's "inherently unknowable injury" first manifests itself to the plaintiff.[52] Applying that standard here, the Court might be inclined to dig further into the record to determine when these plaintiffs were first advised they had elevated blood glucose levels or other indicia of diabetes.[53] But this inquiry is not necessary here because, as both parties acknowledge, each of the Plaintiffs was diagnosed with diabetes more than two years prior to the date on which they filed their respective complaints. So, the only way the Plaintiffs' claims can survive AZ's statute of limitations challenge is if the Court determines that the statute is tolled beyond the date on which the Plaintiffs learned of their diagnoses/injuries.

In *Brown v. E.I. duPont de Nemours & Co., Inc.,* our Supreme Court appears to have extended the time of discovery exception in cases where a plaintiff "remain[s] blamelessly ignorant of [a] potential claim even after a latent injury reveals itself

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[51] *See Layton,* 246 A.2d at 798. *See also Greco v. Univ. of Delaware*, 619 A.2d 900, 906 (Del. 1993) ("Commencement of the running of the statute does not depend on when a diagnosis is made or a cure effective. [] The statute starts, rather, when the harmful effect first manifests itself and becomes physically ascertainable."); *Collins v. Wilmington Med. Ctr.,* 319 A.2d 107, 109 (Del 1974) (same); *Morton v. Sky Nails*, 884 A.2d 480, 482 (Del. 2005) (holding that the statute of limitations began to run at the time plaintiff's injury was "physically ascertainable").

[52] *Id.*

[53] *See* http://endocrineweb.com/diabetes/diagnosis.html ("The gold standard for diagnosing diabetes is an elevated blood sugar level after an overnight fast...."). This inquiry would be justified because a formal diagnosis may not represent the first instance when an injury is "physically ascertainable."

through physical ailments."[54] In such cases, the Court determined that the statute of limitations begins to run when a plaintiff is "on notice of a potential tort claim."[55] And, to determine when the plaintiffs "had notice of their claim," the Court looked to when "someone from the scientific community found and revealed publicly a link

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[54] *Brown,* 820 A.2d at 368.

[55] *Id.* In this regard, the Supreme Court in *Brown* found persuasive a line of authority that emerged in the toxic tort context, particularly *In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996). *See Id.* at 367. As the Court explained, those cases involve injuries with "latency period[s] where the harmful effects of the toxic exposure are not discoverable for several years." *Id.* Interestingly, in *In re Asbestos Litig.*, the Supreme Court noted that it was confronting an "unusual situation" in that the plaintiff there had been suffering from asbestosis-like symptoms for more than twelve years even as his doctors continued to assure him that he was not suffering from an asbestos-related disease. *See In re Asbestos Litig.*, 673 A.2d at 163. Under these circumstances, the Court determined that the injury was not "physically ascertainable" until it had been medically diagnosed, and the date of diagnosis was within two years of the date of filing. *Id.* at 164. *See McClements*, 820 A.2d at 381 (distinguishing *In re Asbestos Litig.* because the plaintiff's injury in *McClements* "was a known medical fact" more than two years before his claim was filed). *In re Asbestos Litig.* confounds the analysis here because each of the Plaintiffs *sub judice* had been diagnosed with diabetes (their alleged injury) more than two years before they filed suit. Stated differently, their injuries were "known medical fact[s]" more than two years before they filed their claims. Moreover, the record is devoid of evidence that they were somehow put off the path of inquiry into the causal connection between their injuries and Seroquel® by a treating doctor or otherwise. The "unusual circumstance" presented in *In re Asbestos Litig.*, therefore, is not present here. *Brown* also presents the same "unusual circumstance" in that the plaintiffs there were informed by their doctors that the cause of their injuries "was unknown." *Brown,* 820 A.2d at 365. Nevertheless, Plaintiffs contend that *Brown* extends the time of discovery exception beyond *Layton* and, perhaps, beyond *In re Asbestos Litig.,* even in the absence of evidence that they were "blamelessly ignorant" of their claims. AZ disagrees. *See AZ* Letter, dated June 18, 2010, Tr. ID 31723291 ("[T]he current state of the law .. is that the statute of limitations begins to run upon the manifestation of the alleged injury, not when the plaintiff connects the dots regarding causation."). The Court need not decide this question, however, because, as discussed below, even under Plaintiffs' interpretation of the time of discovery exception, the statute of limitations still bars their claims.

between the physical condition and the exposure to the toxic substance."[56] The date on which Plaintiffs were placed on notice of their claims "is a question of fact that is to be determined on a case by case basis by the Trial Court."[57]

Plaintiffs argue they were not on notice of their claims against AZ until they "learned about a potential causal connection between Seroquel and diabetes from television commercials discussing Seroquel personal injury litigation."[58] They argue that only then did they learn of sufficient information "to place them on notice that their diabetes was the result of a tortious cause."[59] The Court disagrees.

At the outset, the Court must observe that Plaintiffs appear to misapprehend the standard by which their "notice of a potential tort claim" must be measured.[60] From their argument, it seems Plaintiffs would have the Court apply an "actual notice"

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[56]*Id. See also Bowen v. E.I. duPont de Nemours & Co., Inc.,* 906 A.2d 787, 789 n.4 (Del. 2006) (noting that in *Brown* "the statute of limitations did not begin to run until the technology and/or knowledge was available to allow the plaintiffs to discover that their injuries, obvious from birth, were caused by the negligence of another.").

[57]*In re Asbestos Litig.,* 673 A.2d at 163 (citing *Bendix Corp. v. Stagg*, 486 A.2d 1150, 1153 (Del. 1984)).

[58]Pls' Ans. Br. 28.

[59]*Id.*

[60]*Brown,* 820 A.2d at 369.

standard.[61] The standard is not "actual notice," however, it is "inquiry notice."[62] As discussed below, Plaintiffs would have found more than adequate publically available information to support a link between ingestion of Seroquel® and diabetes had they looked for it.[63]

The record *sub judice* reflects that both medical and lay sources published information regarding the link between Seroquel® and diabetes as early as 2003.[64]

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[61] Pls' Ans. Br. 28 (arguing that the question of when their "physicians communicated sufficient information to [them] to place them on notice" of the link between Seroquel® and diabetes remains disputed in the evidence).

[62] *See Brown,* 820 A.2d at 368 n. 21; *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.,* 860 A.2d 312, 319-20 (Del. 2004) (holding that, under the time of discovery exception, the statute begins to run "upon the discovery of facts 'constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery' of such facts."); *Krug v. Beebe Medical Ctr.,* 2003 WL 22410777, *1 (Del. Super. Ct. Sept. 30, 2003) (Delaware "law requires that injured parties investigate their claims and file within a specific time."); *Toner v. Allstate Ins. Co.*, 1994 WL 828294, *5 (D. Del. Dec. 29, 1994) (Delaware law "require[s] an investigation" by injured plaintiffs "into why" they were injured); *Duncan v. O.A. Newton & Sons Co.,* 2006 WL 2329378, *7-8 (Del. Super. Ct. July 27, 2006) (holding that a plaintiff may not wait to be "told by [a] doctor...that [he has] a cause of action."); *Id.* at *7 (holding that a plaintiff may not wait to be "told by...[a] lawyer that [he or she has] a cause of action").

[63] *See U.S. Cellular Invest. Co. v. Bell Atlantic Mobile Sys., Inc.,* 677 A.2d 497, 504 n.7 (Del. 1996)(in laches analysis court noted that "...whatever is notice calling for inquiry is notice of everything to which such inquiry might have led.").

[64] For example, in the public domain, the *New York Times*, *Wall Street Journal*, and *National Public Radio* had all reported on the connection. *See* Thomas Burton, *FDA to Require Diabetes Warning On Class of Schizophrenia Drugs*, Wall St. Journal, Sept. 18, 2003, AZ App. Ex. S; Erica Goode, *Leading Drugs for Psychosis Come Under New Scrutiny*, N.Y. Times, May 20, 2003, *Id.* at Ex. R; *Number of Children With Mental Illness is Growing in the U.S.* (National Public Radio (Morning Edition, Sept. 22, 2003), *Id.* at Ex. T. *See Fike v. Ruger*, 752 A.2d 112, 113-14 (Del. 2006) (referring to a "newspaper article" in determining when plaintiffs were on inquiry notice of (continued...)

Moreover, by January, 2004, at the direction of the Food and Drug Administration, AZ had changed its label for Seroquel® to include a "**WARNING... Hyperglycemia and Diabetes Mellitus"** that "Hyperglycemia, in some cases extreme...,has been reported in patients treated with atypical antipsychotics, including Seroquel...[E]pidemiologic studies suggest an increased risk of treatment-emergent hypreglycemia-related adverse events in patients treated with the atypical anti-psychotics studied."[65] Also in January, 2004, AZ sent out a "Dear Doctor" letter in which it alerted the medical community of the new FDA label for Seroquel® and particularly noted the warning regarding potential hyperglycemia/diabetes risks associated with the ingestion of the drug.[66] This warning was reiterated in a second "Dear Doctor" letter that AZ sent out in April, 2004.[67]

In support of its notice argument, AZ has cited a decision from the court presiding over the federal multi-district litigation involving another atypical

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[64](...continued)
their claims for purposes of laches).

[65]This label change was class-wide, meaning that it affected all atypical antipsychotic medications including, *inter alia,* Seroquel® and Zyprexa. *See* AZ App. Ex. M. The "warning" broadcast on Seroquel's label was in all capital letters and bold print. *See* AZ App.Ex. N

[66]*Id.* at Ex. P.

[67]*Id.* at Ex. Q.

antipsychotic medication, Zyprexa.[68] There, the court concluded that March 1, 2004, was "the latest possible date" by which both prescribing physicians and their patients must be charged with knowledge of the potential causal link between atypical antipsychotic medications and diabetes for statute of limitations purposes.[69] In this regard, the court pointed specifically to Eli Lilly's "Dear Doctor" letter which, like AZ's nearly identical letter, advised physicians of the recent product label change, including the enhanced warning regarding the link between atypical antipsychotic medications and diabetes and hyperglycemia.[70] *Clark* offers little by way of legal guidance. The statute of limitations was not the main focus of the opinion and the court applied New York and Pennsylvania law.[71] But the court's appreciation of the notice given to patients by the January, 2004 FDA-mandated label change, the "Dear Doctor" letter, and the other items of publically available information cannot be

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[68]*See Clark v. Eli Lilly & Co.,* 2009 WL 1514427, *8 (E.D.N.Y. May 29, 2009).

[69]*Id.*

[70]*Id.*

[71]The Court need not weigh in on one of the questions addressed in *Clark* - whether the so-called "learned intermediary"doctrine would allow the Court to impute the knowledge of Plaintiffs' physicians to the Plaintiffs themselves for purposes of determining the date on which they had notice of their potential claims. *See Id.* (referring to the learned intermediary doctrine in its statute of limitations analysis). The Court's decision here is based on the information available to the *Plaintiffs* had they investigated their claims. Having said this, the Court recognizes that Plaintiffs could have addressed the causal connection between their diabetes and their Seroquel® therapy with their treating physicians in addition to referring to other publically available sources (including AZ's own product inserts).

ignored. The information was there and publically accessible.

In this case, the latest date that any of the Plaintiffs was diagnosed with diabetes was February 2, 2004 (for plaintiff, Burrell). As of that date, not only had the scientific community discovered a possible link between Seroquel® and diabetes, AZ itself had specifically warned of the potential risk in its new label and in its "Dear Doctor" letters. Had Plaintiffs engaged in a reasonable investigation of publically available sources as of January 30, 2004, each of them would have discovered facts that would have provided "notice of a *potential* (as opposed to a guaranteed) tort claim" against AZ.[72] This is when Plaintiffs are "chargeable" with knowledge of their claims.[73]

2. Fraudulent Concealment

Plaintiffs argue that AZ's fraudulent concealment of the "true diabetes risk (and the severity of that risk)" also tolled the two-year statute of limitations on Plaintiffs'

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[72] *See Brown,* 820 A.2d at 369 (emphasis supplied). *See also Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982) (quoting *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, 230 N.W.2d 87, 89-90 (Neb. 1975) ("Even in malpractice and fraud cases where a discovery rule is applied it is not the actual discovery of *the* reason for the injury which is the criteria.") (emphasis supplied). In this regard, the Court is satisfied that Plaintiffs need not have been able to find definitive evidence of a causal link in order to charge them with notice of their potential claims. Indeed, causation is still very much in dispute between the parties even at this stage of the litigation. The publically available evidence as of January 20, 2004 was adequate to place Plaintiffs on notice of their "potential claims."

[73] *Brown*, 820 A.2d at 368 n.21 ("The statute begins to run when a plaintiff is chargeable with knowing that his or her rights have been violated rather than when he or she actually learns about the violation.") (citing *In re Asbestos Litig.*, 673 A.2d at 163).

claims.[74] The fraudulent concealment doctrine presents "an exception to the usual rule that ignorance of the facts does not toll the statute of limitations."[75] "Fraudulent concealment requires an affirmative act of concealment or 'actual artifice' by a defendant that prevents a plaintiff from gaining knowledge of the facts."[76] Stated differently, Plaintiffs must establish that AZ knowingly and affirmatively acted in a fraudulent manner to "conceal[] ... the facts necessary to put [them] on notice of the truth."[77] "Mere ignorance of the facts by a plaintiff, where there has been no such concealment, is no obstacle to operation of the statute [of limitations]."[78]

Plaintiffs have gone to great lengths to provide evidence from 1997 through 2007 that, when read in a light most favorable to them, suggests that AZ may have withheld some of the risks of Seroquel® therapy of which it was aware, including those revealed in clinical trials of the drug. And, to be sure, this evidence may well

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[74] Pls.' Answering Br. 33.

[75] *Ruger v. Funk*, 1996 WL 110072, at *19 (Del. Super. Jan. 22, 1996).

[76] *Weiss v. Swanson*, 948 A.2d 433, 451-52 (Del. Ch. 2008).

[77] *See Gregorovich v. E.I. duPont de Nemours & Co., Inc.,* 602 F. Supp.2d 511, 519 (D. Del. 2009).

[78] *In re Dean Witter P'Ship Litig.*, 1998 WL 442456, *6 (Del. Ch. July 17, 1998) (internal citations omitted).

be probative of Plaintiffs' "failure to warn" and other claims.[79] But, as AZ correctly points out, "Plaintiffs are unable to overcome the fact that the very evidence they claim was concealed - that Seroquel might potentially cause diabetes - was publicly available in FDA's class-wide label since early 2004 at the latest."[80] To put it differently, the information to which Plaintiffs refer may enhance the probative force of their ultimate claims but it does not diminish the information already available to them as of January 30, 2004 - - information that was more than adequate to put them on notice of their potential claims. The statute of limitations on Plaintiffs' claims, even if tolled by fraudulent concealment, began to run at the latest for plaintiffs Flowers and Ro by January 30, 2004, when the FDA label change went into effect and the "Dear Doctor" letters were mailed to physicians throughout the country.[81] For plaintiff Burrell, the statute began to run at the latest on February 2, 2004, the date on which she was diagnosed with diabetes.

VI.

Plaintiffs Burrell, Flowers and Ro filed their complaints on January 31, 2007,

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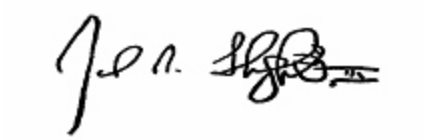
[79] **[REDACTED]**

[80] AZ Rep. Br. 12.

[81] *See Weiss*, 948 A.2d at 451 ("If the limitations period is tolled...it is only tolled until a plaintiff discovers, or by exercising reasonable diligence should have discovered, his injury. Thus, the limitations period begins to run when the plaintiff is objectively aware of the facts giving rise to the wrong, *i.e.* on inquiry notice." (footnote omitted)).

April 5, 2007, and April 12, 2007, respectively. The Court has determined that the latest accrual date for each of their causes of action, taking into account all applicable tolling doctrines, is January 30, 2004 for plaintiffs Flowers and Ro, and February 2, 2004 for plaintiff Burrell. Based on the foregoing, AZ's Motion for Summary Judgment must be **GRANTED** because each of the Plaintiffs' complaints was filed beyond the applicable two year statute of limitations.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

JRS, III/sb

Original to Prothonotary